No. 19-35277

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BLOCKTREE PROPERTIES, LLC, a Washington limited liability company, et al.

Plaintiffs-Appellants,

v.

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON, a Washington municipal corporation, et al.

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Washington, Spokane, No. 2:18-cv-00390-RMP

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

1. Plaintiff-Appellant Blocktree Properties, LLC, is a subsidiary of Blocktree, Inc., a Delaware corporation. No publicly traded corporation owns 10% or more of its stock.

2. Plaintiff-Appellant Corsair Investments WA, LLC is a wholly-owned subsidiary of Corsair Investments, LLC, a Colorado Limited Liability Company. No publicly traded corporation owns 10% or more of its stock.

3. Plaintiff-Appellant Cytline, LLC has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

4. Plaintiff-Appellant 509 Mine, LLC has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

5. Plaintiff-Appellant MIM Investors, LLC is owned jointly by Cytline, LLC and 509 Mine, LLC. No publicly traded corporation owns 10% or more of its stock.

6. Plaintiff-Appellant Miners United, LLC has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

7. Plaintiff-Appellant WeHash Technology, LLP has no parent corporation and no publicly traded corporation owns 10% or more of its stock.

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Commissioners: Defendants Brewer, Bernd, Walker, Flint and Schaapman, who were the elected Commissioners of Grant PUD when Rate Schedule 17 was adopted.

Blockchain: A computer technology that allows the use of independently verified distributed ledgers to permit transactions without the need for a trusted intermediary. Cryptocurrencies are one application that uses blockchain.

Cryptocurrency: One of a number of non-governmental, computer-based currencies that operate using block-chain technology, which permits the use of a secure, immutable, open, and independently-verified distributed ledger of transactions, and can be used to transfer value between entities or persons that consent to the use of the cryptocurrency.

EI Queue: Grant PUD's policy, adopted in conjunction with Rate Schedule 17, the prioritizes all interconnection requests from "traditional" customers over all interconnection requests from cryptocurrency customers.

FERC: The Federal Energy Regulatory Commission, a federal agency that regulates hydroelectric power, interstate commerce in electricity and natural gas, and related missions. *See* www.ferc.gov.

FPA: Federal Power Act, 16 U.S.C. §§ 791a *et seq.*

Grant PUD: Defendant Public Utility District No. 2 of Grant County, Washington, a public utility district operating under Title 54 of the Revised Code of Washington.

Grant Staff: Defendants who were Grant PUD officers and employees who participated in the development and implementation of Rate Schedule 17.

kwh: Kilowatt-hours, a measure of electrical consumption. A device consuming one thousand watts of power for one hour consumes one kilowatt-hour of electricity.

MWh:	Megawatt-Hours, a measure of energy production or consumption. An electric generator operating a one megawatt of capacity for one hour produces one megawatt-hour and an electric consumer using one megawatt of electricity for one hour consumes one megawatt-hour.
MW:	Megawatts. A measure of electrical capacity.
aMW:	Average megawatts. A measure of the load on an electrical system.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants filed a complaint in the U.S. District Court for the Eastern District of Washington seeking preliminary and permanent injunctive relief, a declaratory judgment, and damages against Defendant-Appellee Public Utility District No. 2 of Grant County, Washington ("Grant PUD") under the Commerce Clause of the United States Constitution, the Due Process Clause of the Fifth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, 42 U.S.C. §§ 1983 & 1988, the Federal Power Act, RCW Title 54, and the Constitution of the State of Washington. The District Court properly exercised jurisdiction over the federal claims under 28 U.S.C. § 1331 and 16 U.S.C. § 813. It properly exercised jurisdiction over the state claims under 28 U.S.C. § 1367.

Plaintiffs moved for a preliminary injunction, which the District Court improperly denied. This Court has jurisdiction over this appeal of that order under 28 U.S.C. § 1292(a)(1).

INTRODUCTION

According to a recent press release touting Rate Schedule 17, the policy at issue in this litigation, Defendant Public Utility District No. 2 of Grant County ("Grant") announced that Plaintiffs, its existing cryptocurrency customers, would immediately experience a massive rate increase, while electric rates would not increase for any other Grant customer.[1] The rate increase, effective April 1, 2019, averages approximately 30% for Grant's cryptocurrency customers, and it will be followed by two more rate increases that in total will increase Plaintiffs' rates in the range of 300-400%. For Plaintiffs with smaller operations, the April 1 rate increase by itself will raise their rates approximately 95%.[2] No other Grant customers will pay these rate increases.

Grant PUD is fully aware that these rate increases will devastate Plaintiffs' businesses. One of the Commissioners who voted to approve Rate Schedule 17 recognized that "three hundred percent is a huge increase. These people need to be able to operate their businesses with some assurance that they won't have to write off millions because we told them to leave." ER0062. Another Commissioner

[1] Grant PUD press release, "Phase-in of new 'evolving industry' rate begins April," posted March 25, 2019 (available at: https://www.grantpud.org/news?nid=NDM5NDY=&page=1&month_year=2019-03&#scrlnws).

[2] *See* Declaration of Mark Vargas, attached as Exhibit A.

recognized that Plaintiffs, who are all established customers of Grant PUD, did not cause any of the problems Rate Schedule 17 was ostensibly intended to address: "None of the [cryptocurrency businesses] who are already here are causing harm to our system." ER0062.

Nonetheless, the Commissioners voted to adopt Rate Schedule 17. Although Grant PUD's actions are a textbook example of utility rate discrimination and create immediate threats to the viability of Plaintiffs' businesses by rendering their most important input unaffordable and their operations uncompetitive, the District Court nonetheless rejected Plaintiffs' request for a preliminary injunction. The District Court's order is based on a series of egregious legal errors compounded by a rash of unsupportable factual conclusions. Plaintiffs therefore respectfully ask this Court to reverse the District Court's judgment and issue a preliminary injunction barring Grant from implementing Rate Schedule 17, Grant's so-called "Evolving Industries" rate schedule, for the duration of this litigation.

STATEMENT OF ISSUES

Defendant Grant PUD, without affording Plaintiffs any procedural safeguards, classified Plaintiffs as "Evolving Industries," and therefore subject to a rate schedule that applies only to Plaintiffs and is designed to and will in fact render Plaintiffs' business operations in Grant County economically unfeasible. The District Court denied Plaintiffs' Motion for Preliminary Injunction seeking to enjoin the implementation of the "Evolving Industries" rate schedule. The issues presented are:

1. Whether Plaintiffs are likely to succeed on their claim that the "Evolving Industries" rate schedule is illegally discriminatory, where the rate amounts to an unjustifiable direct transfer of wealth from Plaintiffs to Grant's politically favored customers, Grant violated its own internal policies in enacting the rate, the rate bears no relation to Grant's actual costs to serve Plaintiffs, and Grant exempted its politically favored customers from the rate even though they are indistinguishable from Plaintiffs in all relevant respects.

2. Whether Grant County PUD is subject to the anti-discrimination provisions in Section 20 of the Federal Power Act.

3. Whether Plaintiffs are likely to succeed on their due process claim, where Grant classified Plaintiffs as "Evolving Industry" with no notice, hearing, or

other procedural safeguards, and the "Evolving Industry" rate violates their property rights in non-confiscatory and non-arbitrary utility rates.

4. Whether Plaintiffs face an immediate threat of irreparable harm, where the "Evolving Industries" rate will render their business operations economically untenable, and where its implementation violates their constitutional rights.

5. Whether an injunction preventing implementation of the "Evolving Industries" rate would serve the public interest, where its implementation violates Plaintiffs' constitutional rights and serves only the parochial interests of select Grant County PUD customers, not the long-term goals of Grant County PUD or its broader customer base.

STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to this brief.

STATEMENT OF THE CASE

A. The Parties.

1. Plaintiffs.

Plaintiffs are high technology firms that provide verification and security services for block-chain based cryptocurrencies (often referred to as cryptocurrency "mining") and, in some cases, other data center services. *See, e.g.*, Claire Henley *et al.*, *Energizing the Future With Blockchain*, 39 Energy L. J. 197, 200-05 (2018) (available at: https://www.eba-net.org/assets/1/6/14-197-232-Blockchain_[FINAL].pdf); Commodities Futures Trading Commission, *A CFTC Primer on Virtual Currencies*, Oct. 17, 2017 (available at: https://www.cftc.gov/sites/default/files/idc/groups/public/%40customerprotection/documents/file/labcftc_primercurrencies100417.pdf); N. Tawari, *The Commodification of Cryptocurrency*, 117 Mich. L. Rev. 611 (2018).

2. Grant County PUD.

Defendant Public Utility District No. 2 of Grant County ("**Grant PUD**") is a Public Utility District operating under Title 54 of the Revised Code of Washington ("**RCW**") that provides electric service to all consumers in Grant County,

Washington. Grant PUD is governed by a five-member board of elected Commissioners (collectively, the "**Commissioners**"). Rate Schedule 17 was developed by Grant officers and employees ("**Grant Staff**") and approved by the Commissioners.

In 2017, Grant PUD sold more than 4.6 million Megawatt-hours ("**MWh**") of electricity, and its load averaged 535 Megawatts ("**MW**"). Although Grant PUD is experiencing significant growth in its electric loads, the generating capacity available from Grant PUD's existing resource portfolio exceeds 2,200 MW, sufficient to serve Grant's expected load growth through at least 2024. ER0071. Grant anticipates that load growth will require significant new investments in transmission infrastructure beginning in 2026. ER0311.

B. Plaintiffs Relied on Grant PUD's Promises of Low and Stable Rates in Determining to Locate in Grant County.

Relying on promises made by Grant PUD that their electric rates would remain low and stable, each Plaintiff located data centers in Grant County and, collectively, invested approximately $15.45 million in the County. *See* ER0355-0356; ER0361-0362; ER0369-0370; ER0374-0376; ER0378; ER0404-0405. Grant PUD's promises to Plaintiffs are embodied in Resolution No. 8768, adopted in May 2015, which establishes Grant PUD's rate-setting policies. These policies require that: (1) rate increases shall be implemented "in small, predictable increases"; (2) "all customers' first 7,300,000 monthly kwh consumption"

(equivalent to 10 MW of demand) will be treated as "preferential access to the low cost embedded power supply resources in place as of the year 2013," which primarily includes the Priest Rapids Project, a large, federally-licensed hydroelectric dam; (3) rate changes will be designed to limit "rate shock," with specific limits related to changes in Grant's overall cost of service; (4) "[i]n a year that no general retail rate increase is put into effect, no increase will be applied to any rate schedule"; and, (5) rates will be guided by cost-of-service analysis. ER0199-0200.

Plaintiffs have each taken electric service from Grant PUD for periods as long as five years, each has paid all bills owed to the PUD, and each has substantial deposits on file with Grant PUD, which protect Grant should any of the Plaintiffs default on their electric bills. ER0356; ER0361-0362; ER0370-0371; ER0376, ER0378-0379; ER0406. Currently, Plaintiffs all take service from Grant PUD under Rate Schedule 7, the rate for "Large General" service, which is designed for electric loads of between 200 to 5,000 kW of billing demand (0.2 to 5 MW). Collectively, Plaintiffs' facilities operate with an electrical capacity of approximately 9 MW, and place an average load of approximately 5.2 MW on

Grant, paying approximately $1.55 million per year to Grant for electric service. *See* ER0356; ER0361; ER0370; ER0376, ER0378; ER0406.[3]

At the time Plaintiffs established operations in Grant County, Grant PUD had a significant excess of both generating capacity and transmission capacity. ER0104-0105; ER0178. Hence, Grant was not required to construct any new facilities to serve Plaintiffs, apart from certain distribution and direct-interconnection facilities, which Plaintiffs paid for upfront. ER0356; ER0362; ER0371; ER0377, ER0379; ER0406. Since they began taking electric service, Plaintiffs, with one exception, have not increased the amount of power they take from Grant PUD or otherwise changed their operations in any way that would increase Grant PUD's cost to serve them.[4]

C. The Evolving Industry Queue and Rate Schedule 17.

In late 2017, cryptocurrency prices experienced a significant, but temporary, spike. ER0208. This produced a temporary spike in investor interest in the industry. Although Grant's "load forecasts are based on signed agreements," not

[3] After the District Court's order, Telco 214, one of the original Plaintiffs in this case, which had an electric capacity of 6.25 MW, shut down its cryptocurrency operations in Grant County and withdrew from the case.

[4] The exception is Plaintiff Mark Vargas who, after Rate Schedule 17 went into effect, slightly increased his power consumption in order to move from Rate Schedule 17A to Rate Schedule 17B, in an attempt to mitigate his losses from being moved into Rate Schedule 17. *See* Ex. A, Vargas Decl.

mere inquiries, which "do not materialize for a variety of reasons," ER0076, on April 1, 2018, Grant publicly claimed it had received 109 "inquiries for service" from cryptocurrency "miners" and other high-tech industries, that could purportedly increase Grant PUD's load by 2,000 MW. ER0073. Although Grant Staff considered "getting a list of real customers and dropping the queue to a realistic number," ER0081, it never did. Instead, throughout the relevant period it claimed publicly that it faced a 1,500-MW flood of cryptocurrency "miners." ER0062.

If it ever existed, the flood has now largely dissipated. By January 2019, Grant publicly admitted that the queue of new cryptocurrency miners seeking service from Grant had dwindled to just 313.5 MW, [5] one-fifth of the 1,500 MW projection. Even this number is exaggerated because at least one of the companies in the queue, which sought 100 MW of capacity, was dissolved in late 2018. [6]

But Grant's claims of a threatened "flood" of cryptocurrency demand produced hysteria among Grant's "traditional" customers. In comments filed with

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[5] Paul Roberts, *After the Bitcoin Bust and a Local Bankruptcy, Douglas County Doubles Down on Blockchain*, Seattle Times, Jan. 11, 2019 (https://www.seattletimes.com/business/after-the-bitcoin-bust-and-a-local-bankruptcy-douglas-county-doubles-down-on-blockchain/).

[6] Grant identifies GW One, LLC as having 100 MW in the queue for new service. That entity was "administratively dissolved" as of December 3, 2018. *See* https://ccfs.sos.wa.gov/#/BusinessSearch/BusinessInformation.

the Commission, they claimed, for example, that cryptocurrency miners are "parasites" and the Commission should "make them go away," ER0085-0086, and that "many ratepayers dislike giving away our energy at cost to large out of county users." ER0083; *see also* ER0089. Politically powerful local interests like the Port of Moses Lake urged the Commission to reserve Grant's power resources for "traditional" and "long-term" customers, to force cryptocurrency to take "second priority" to those customers, ER0091-0092, and to impose punitive rates on cryptocurrency businesses. ER0096.

Even as Grant PUD continued to hand out preferential favors to these traditional customers, ER098 (email from Port of Royal Slope thanking Grant PUD for treating transmission construction cost as electric system cost and prioritizing Port's project over other customer requests), it enacted two policies designed, as Commissioner Bernd described it, to "t[ell] them" – disfavored cryptocurrency businesses – "to leave." ER0062. First, Grant revised its interconnection policy, which previously provided service to new customers on a first-come, first-served basis, creating a new queue system that "prioritized traditional customers over all crypto customers," ER0114 (the "**EI Queue**"), so that cryptocurrency businesses are moved "to the back of the line," ER0119, and cannot interconnect with Grant "until all traditional customers are satisfied (which may never occur)." ER0114. Grant Staff believes this policy will effectively eliminate service to new

cryptocurrency customers because it will be years, if ever, before the queue of "traditional" customers are exhausted and cryptocurrency customers can be served. ER0215.

Second, Grant adopted Rate Schedule 17, which was designed to force cryptocurrency businesses to "pay above their costs," ER0100, to "provide economic benefit to core customers," ER0102, and to deny cryptocurrency businesses "access to low cost power benefits from the Priest Rapids Project," ER0109, the federally-licensed dam that provides the lion's share of Grant PUD's power supply.

Third, Grant PUD revised its policy regarding construction of facilities for new customers, requiring new customers to pay upfront for any new transmission or distribution facilities needed to serve them. ER0448; ER0250 (requiring new customers 500 kW and larger to pay for "any associated transmission for the requested service").

Most utility rate schedules, including Grant PUD's, classify customers based on the amount of power they consume and other factors directly related to the utility's cost to serve that class of customers. ER0296-0297. Unlike any other utility rate schedule, Rate Schedule 17 purports to create an "Evolving Industry" rate class based on the supposed business risks of the customer class rather than the utility's cost to serve that class.

Specifically, Rate Schedule 17 purports to classify Grant PUD's customers as "Evolving Industry" based on a three-pronged test. Evaluation of the first prong, "Concentration Risk," "would begin to occur when industry concentration of existing and service request queue customer loads exceeds 5% of Grant PUD's total load." ER0123. Grant PUD's total load in 2018 averaged approximately 603 megawatts ("MW"). ER0209. Hence, an industry would not meet the "concentration risk" threshold unless its total load on Grant exceeds 30 average MW ("aMW").[7]

If the "concentration risk" threshold is met, the industry must meet "one of two other criteria":

> 1. Regulatory Risk – Risk of detrimental changes to regulation with the potential to render the industry inviable within a foreseeable time horizon.
> 2. Business Risk – Potential for cessation or significant reduction of service due to a concentration of business risk, in an evolving or unproven industry, in the value of the customer's primary output.

Rate Schedule 17 further purports that Grant Staff, not the Commission, will "[n]o less than annually" review the rate class to determine "if it is appropriate" for a "customer's industry" to move into or out of the class. ER0123.

[7] In its March 25 press release touting Rate Schedule 17, Grant PUD states that its average load during 2018 was 597 MW. Press Release, *supra* note 1. Using this load figure does not change any of the arguments set forth herein.

Although Grant Staff recognized these criteria "are applicable to many if not all of our large customers to some degree," ER0127, Grant from the outset specifically targeted cryptocurrency businesses. As early as October 2017, Grant Staff agreed to create a "Separate Rate Schedule" for "Crypto Currency." ER0129-0130. A draft of a White Paper describing Rate Schedule 17 from early April 2018 states that "[c]ustomers that derive a significant amount of their revenue stream from cryptocurrency mining will initially constitute most, if not all, of the members of this rate class." ER0139. The White Paper also claims that "District staff" will employ the risk tests specified in Rate Schedule 17 "to existing and future customers for their inclusion in or exclusion from this class." But these tests are a sham: a comment from one of the Rate's primary authors states, "This hook is intended to keep the District from *appearing arbitrary by targeting only one industry*. Treating these industries as members of a population of uses rather than individual targets (*which we are*) preserves the value and defensibility of our local control to our traditional customers and regulatory bodies alike." ER0150 (emphasis added). Comments in the same document reveal that the 5% "concentration" threshold was carefully formulated to "keep the focus on cryptocurrency miners" and to exclude high-risk industries such as cannabis. ER0143. Grant Staff recognized the difficulty of "perfecting" the definition of Evolving Industry and the dubious legality of Rate Schedule 17 but proceeded

because it thought it could "slow roll any legal challenges to the definition." *See* ER0133 at note "SF1."

In June 2018, nearly three months before the Commission adopted Rate Schedule 17, Grant Staff stated: "Mining of any kind will result in moving to [the Evolving Industry] rate." ER0153. In late June 2018, Grant Staff prepared a newspaper notice for its July 10, 2018 meeting, stating that the Commission would consider Rate Schedule 17, "which applies to cryptocurrency mining." ER0156. This language was later reworded because "we don't want to imply that Rate Schedule 17 only applies to crypto." ER0158. Nonetheless, in July 2018, Grant Staff stated: "Crypto-mining customers are placed in that rate class." ER0161. In mid-August 2018, the Grant Staff member primarily responsible for Rate Schedule 17 was asked if "this rate is just targeted at cryptocurrency folks." He responded, "Cryptocurrencies are the only industry that would currently fall into the Evolving Industry rate class." ER0164.

The Commissioners adopted Rate Schedule 17 on August 28, 2018. On the *same day*, Grant Staff posted a press release stating: "At this time, all Grant customers in the evolving industries profile are miners of cryptocurrency." ER0167-0169. Of course, there was no time for Grant Staff to conduct any of the

analysis supposedly required by Rate Schedule 17,[8] let alone notify Plaintiffs or provide an opportunity to present evidence. Nor were any findings ever made that Plaintiffs satisfy any of the criteria required to be classified as "Evolving Industry." Nor did Grant Staff analyze any other industry for inclusion in the "Evolving Industry" class, ER0049, although Grant Staff recognizes that many of its largest customers fit the Evolving Industry criteria. ER0127; *see also* ER0171.

Rate Schedule 17 imposes rate increases averaging 39% per annum over three years beginning on April 1, 2019. ER0320. The increase is even higher for smaller customers because the fixed monthly charge, which constitutes a larger proportion of the bills of smaller customers, will rise from $148 per month currently to $1000 per month. ER0123. Grant justifies these enormous rate increases on three primary grounds.

First, Grant identifies the cost to serve Plaintiffs under Rate Schedule 17 as $0.0281/kwh. ER0310. This portion of the rate is uncontroversial, but Plaintiffs will pay roughly triple this amount under Rate Schedule 17. *Id.*

[8] Rate Schedule 17 calls for Grant Staff to perform "Porter's Five Forces" analysis to determine if an industry is "Evolving." But this analysis requires 15-30 person-weeks of effort. *See* ER0305-0306.

Second, much of the rate increase above the cost of service is driven by a 32% "premium" Grant imposes on Rate Schedule 17 customers. ER0307.[9] The premium is intended to force cryptocurrency customers to "subsidize … below cost rates for residential, irrigation, and small and medium-sized business customers." ER0192. Grant concedes "this cross-subsidy is an explicit transfer from one group of customers to another." ER0419.

Third, Grant claims that much of the rate increase is justified by the need to accelerate new transmission construction from 2026, when Grant anticipates it would need to build new transmission facilities, to 2021, when it projects an additional 200 MW of demand from cryptocurrency businesses will exceed the capacity limits on its existing transmission infrastructure during 3% of the hours each year. ER0311-0315.

There are several other smaller elements supposedly justifying the rate increase. For example, Rate Schedule 17 imposes a distribution surcharge on Plaintiffs even though they have already paid for the upgrades on the distribution system necessary to serve them, and there is no evidence they have caused any damage to Grant's distribution system. ER0315-0316; ER0197. Although each is

[9] Plaintiffs calculated the premium to be 31% but Grant conceded it is actually 32%.

seriously flawed, and Plaintiffs reserve their right to challenge each element, Plaintiffs do not further discuss these challenges for purposes of this appeal.

D. Proceedings Below.

Seeking to prevent the extreme and devastating consequences of Rate Schedule 17, Plaintiffs filed a lawsuit in the U.S. District Court for the Eastern District of Washington and moved for a preliminary injunction. On Friday, March 29, 2019, the District Court issued an order denying the motion.

On the following Monday, April 1, Grant PUD imposed the first step of the rate increases required under Rate Schedule 17, despite the fact that, as Grant announced in a press release, rates will not increase for any other Grant customers and "only the county's cryptocurrency mining firms are scheduled to take service under Rate 17." Grant PUD press release, *supra* note 1. In the case of Plaintiff Mark Vargas, who runs two relatively small facilities, the overall rates for one of these facilities are set to increase by approximately 95% just from the April 1 rate increase.[10] *See* Ex. A, Vargas Decl. As Grant's March 25 announcement acknowledges, its "all-in electricity rate" for these smaller customers will rise

[10] As noted above, Mr. Vargas is attempting to partially mitigate this extreme and immediate rate increase by increasing his demand. Even if his attempts at mitigation are successful, Mr. Vargas faces rate increases similar to those of other Plaintiffs.

"from the current 4.9 cents per kWh to 13.7 cents per kWh in 2021." Grant PUD press release, *supra* note 1.

Despite Grant's blatant and obvious discrimination in singling out cryptocurrency businesses for this devastating rate increase, the District Court concluded that Plaintiffs are not likely to succeed in demonstrating that Rate Schedule 17 discriminatory. As we now demonstrate, the District Court's order must be reversed because it is based on several egregious legal errors as well factual conclusions that cannot be squared with record evidence, much of it Grant's own documents.

SUMMARY OF THE ARGUMENT

The District Court abused its discretion by denying Plaintiffs' motion for a preliminary injunction. Its order rests on plain legal errors and factual findings unsupported or contradicted by record evidence.

I.

Washington and federal law both require Grant PUD to formulate non-discriminatory rates. Grant's EI Queue Policy, which puts Plaintiffs and other cryptocurrency companies behind all traditional customers for future interconnection requests, is discriminatory on its face. The District Court ignored this policy, and its decision must be reversed for this reason, even without taking

into account the Court's many other errors. These additional errors also require reversal of the District Court's decision.

First, under Rate Schedule 17, Plaintiffs must pay a 32% "premium" which is nothing more than a transfer of wealth from Plaintiffs to Grant PUD's favored "traditional" customers. This premium is obviously discriminatory. In addition, because it is unrelated to Grant's cost to serve Plaintiffs, it is grossly excessive. It also violates Grant's own internal policies. The District Court's conclusion that the "premium" is justified by the need for upgrades, wear on the system, or risks of losing cryptocurrency load is plainly incorrect because Grant uses those factors to try to justify other elements of Rate Schedule 17, but the "premium" is a separate element of the rate.

Second, Grant's adoption of Rate Schedule 17 is arbitrary and capricious because it violates Grant's Resolution No. 8768, Grant's consumer protection policy, which prohibits rate increases for any rate schedule in years with no general retail rate increases, prohibits rate increases of more than 2% per year, and assures that all Grant customers receive access to Grant's embedded low cost power supply for the first 10 MW of demand. The District Court's conclusion that Grant PUD was free to ignore Rate Schedule 8768 is logically incoherent and contrary to the relevant case law.

Third, Rate Schedule 17 wrongfully imposes transmission upgrade costs on Plaintiffs who are all current Grant customers that ostensibly would be caused by the acceleration of Grant's current plans for transmission upgrades from 2026 to 2021. The District Court's conclusion that Grant could permissibly impose these costs on Plaintiffs is unsupportable for several reasons. Factually, it is contrary to evidence from Grant PUD's own emails concluding that the EI Queue Policy will delay service for any new cryptocurrency customer for many years, if not forestalling future cryptocurrency customers altogether. In any event, any costs for new transmission upgrades would be caused by new customers, not by existing customers like Plaintiffs, so this element of Rate Schedule 17 violates well-established principles of cost causation. Further, Grant PUD now requires new customers to pay upfront for transmission upgrades required to serve them, so there is no longer any possibility that existing Grant customers would have to pay "stranded" costs for transmission that is constructed and then abandoned by those new customers. Rate Schedule 17 therefore would arbitrarily require Plaintiffs to pay costs that Grant will recover from future ratepayers.

The District Court also erred by concluding that "grandfathering" Plaintiffs into their existing rates is "legally untenable." Grandfathering has long been recognized as valid under both federal and Washington law as a means to protect the settled expectations of a utility's customers when a new policy, like Rate

Schedule 17, diverges from previous policy. In fact, Grant PUD's own Rate Schedule 7, under which Plaintiffs take service, contains a grandfathering provision.

The District Court also wrongly concluded that Grant may classify Plaintiffs as "evolving industry" while ignoring other Grant customers that meet the "evolving industry" criteria. Grant recognizes that a) Plaintiffs are indistinguishable from large data centers in terms of Grant's costs to serve them, and b) other large Grant customers, especially those in the polysilicon industry, meet Rate Schedule 17's criteria. Nonetheless, Grant still designated only Plaintiffs as "Evolving Industry" and never even considered any of these other industries. The District Court's conclusion that Grant's actions were not discriminatory is based on an obvious misreading of the evidence, which shows that the polysilicon industry (among many others served by Grant) easily satisfies Rate Schedule 17's concentration risk, regulatory risk, and business risk factors. Treating cryptocurrency differently from other industries based on factors that other industries also share is textbook discrimination; and the District Court erred by concluding otherwise.

Additionally, the District Court committed clear legal error by concluding that Grant is not subject to the non-discrimination requirements of Section 20 of the Federal Power Act. That statute governs Grant and declares all discriminatory

and unjust rates or services to be unlawful. The District Court's conclusion, which is based on dicta in a FERC order which was expressly disclaimed in a later FERC order in the same proceeding, is contrary to both the plain language of the statute and Congress's intention to create a universal non-discrimination mandate with no regulatory gaps.

II.

The District Court also committed legal errors and relied on unsupportable factual conclusions to hold that Plaintiffs are unlikely to succeed on their due process claim. Before Rate Schedule 17 was adopted, Grant violated Plaintiffs' due process rights by summarily concluding that Plaintiffs were "Evolving Industry" without any hearing or findings of fact, depriving Plaintiffs of any notice, opportunity to be heard, or avenue of appeal. Contrary to the District Court's conclusion, Grant's decision to classify Plaintiffs as "evolving industry" was a classic quasi-judicial administrative decision that required procedural safeguards, not a "legislative" act. And the District Court also wrongly concluded, contrary to over a century of federal and Washington law, that Grant may impose confiscatory rates that destroy Plaintiffs' investments in their property. In addition, Plaintiffs have a well-established due process right to non-arbitrary rates, and the District Court therefore erred in concluding that Grant can adopt rate increases of any level with no notice and no opportunity for the effected ratepayers to be heard.

III.

Plaintiffs also face irreparable harm, as the 300-400% rate increases contemplated in Rate Schedule 17 will destroy their businesses and investments in Grant County, and may result in bankruptcy. The District Court simply disregarded the substantial record evidence presented by Plaintiffs on this point, brushing it aside as establishing a "mere possibility" of economic harm. In addition, the District Court erred in concluding that Grant did not violate Plaintiffs' due process rights, which independently establishes irreparable harm.

IV.

Finally, although the District Court properly concluded that the equities favor the Plaintiffs, it wrongly concluded that the public interest would not be served by an injunction based on its incorrect conclusion that Grant has not violated Plaintiffs' constitutional rights.

ARGUMENT

I. Standard of Review.

A party can obtain a preliminary injunction by showing that (1) it is "likely to succeed on the merits," (2) it is "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [its] favor," and (4) "an injunction is in the public interest." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (citations omitted). Under the Ninth Circuit's "sliding scale" approach, "the

elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (citations omitted).

This Court reviews the District Court's denial of a preliminary injunction for abuse of discretion. *American Beverage Ass'n v. City of San Francisco*, 916 F.3d 749, 754 (9th Cir. 2019) (*en banc*). The District Court abuses its discretion if its decision rests "on an erroneous legal standard or on clearly erroneous factual findings." *Id.* (*quoting United States v. Schiff*, 379 F.3d 621, 625 (9th Cir. 2004)). The District Court's conclusions of law are reviewed *de novo* and its findings of fact are reviewed for clear error. *Id.* Factual findings are clearly erroneous if they are "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Arc of California v. Douglas*, 757 F.3d 975, 983-84 (9th Cir. 2014) (internal quotation marks and citations omitted).

The District Court's rejection of Plaintiffs' motion for a preliminary injunction rests on a series of obvious legal errors and findings of fact that cannot be squared with the record evidence. When viewed under the proper legal standards and record evidence, Plaintiffs have met each of the requirements for a preliminary injunction. The District Court's order therefore must be reversed. *American Beverage*, 916 F.3d at 758; *Arc of California*, 757 F.3d at 984.

II. The District Court's Conclusion That Plaintiffs Are Not Likely to Prevail Is Based on Plainly Erroneous Legal Conclusions and Findings of Fact Unsupported by the Record.

A. The District Court's Finding That Plaintiffs Are Unlikely To Demonstrate That Rate Schedule 17 Is Illegally Discriminatory Is Based On Multiple Legal Errors and Unsupportable Factual Conclusions.

The nation's system of utility regulation was designed to prevent the kind of discrimination Rate Schedule 17 embodies:

> The gradual realization that discrimination was substantially aiding certain firms to make tremendous profits (the classic example is Standard Oil of New Jersey) and to engage in selling at prices below those possible for companies not receiving special rates or rebates – and thus forcing these unfavored firms out of business – was one of the driving forces behind the movement for regulation.

Charles F. Phillips, Jr., *The Regulation of Public Utilities* (2nd ed. 1988) at 62-63. Rate Schedule 17 is a throwback to exactly this kind of discrimination – it was, in Commissioner Bernd's words, intended to "t[ell] them" – disfavored cryptocurrency businesses – "to leave" – and to favor Grant's traditional "core customers." ER0062-0063.

But Washington law requires Grant PUD to formulate non-discriminatory rates. RCW 54.24.080(1) states that Grant's "commission . . . shall be required to

establish" rates for electric energy that are "fair" and "nondiscriminatory."[11] Washington courts have interpreted this mandate to require that a PUD "establish its rates at the lowest possible point." *Carstens v. PUD No. 1 of Lincoln Cnty.*, 8 Wn. 2d 136, 151 (Wash. 1941). Accordingly, rates are illegal if "they are excessive and disproportionate to the services rendered," *Lincoln*, 45 Wn. App. at 12, and are not designed to "cover *actual costs* to be incurred by the PUD" in providing service. *Wash. Manufactured Hous. Ass'n v. PUD No. 3 of Mason Cnty.*, 124 Wn. 2d 381, 386 (Wash. 1994) (emphasis added). Hence, Grant PUD must ensure that all customers within a rate class "are treated equally" and that there is a "reasonable basis" for placing customers in different classes based on cost of service. *See Silver Shores Mobile Home Park, Inc. v. City of Everett*, 87 Wn. 2d 618, 623 (Wash. 1976). Different rates can be charged to different customer classes only if "scientific statistical analysis" or similar evidence shows substantial differences in the costs of serving those different customer groups. *Lincoln Shiloh Assocs., Ltd. v. Mukilteo Water Dist.*, 45 Wn. App. 123, 129-30 (Wash. Ct. App. 1986).

[11] The non-discrimination requirement applies in all cases except for rates designed to assist low-income customers. *See* RCW 54.24.080 (2)-(3); RCW 74.38.070.

Likewise, because Grant PUD holds a federal hydropower license,[12] Section 20 of the Federal Power Act ("FPA") also bars Grant from imposing discriminatory rates. Section 20 requires that "the rates charged and the service rendered" by Grant "shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable, discriminatory and unjust rates or services are prohibited and declared to be unlawful." 16 U.S.C. § 813.

In reaching the conclusion that Plaintiffs are not likely to succeed on the merits of their rate discrimination claim, the District Court simply ignored the EI Queue Policy, which is obviously discriminatory, since it forces Plaintiffs and other cryptocurrency industries to the back of the bus for any future interconnection requests. By itself, this justifies reversal of the District Court's conclusion that Plaintiffs are unlikely to succeed on their discrimination claim. The District Court compounded this error by committing a series of obvious legal errors, as well as basing its decision on unsupportable factual conclusions.

1. The District Court Erred In Concluding That Extracting a 32% "Premium" To Transfer to Grant's Favored "Traditional" Customers Is Legally Justified.

Rate Schedule 17 imposes a 32% "premium" on Plaintiffs that is simply a direct transfer of wealth from Plaintiffs to Grant's favored "traditional" customers,

[12] Grant PUD holds Federal Energy Regulatory Commission ("**FERC**") hydropower license No. No. 2114 for the Priest Rapids Project.

requiring cryptocurrency customers to "subsidize . . . below cost rates for residential, irrigation, and small and medium-sized business customers." ER0192. Grant concedes "this cross-subsidy is an explicit transfer from one group of customers to another." ER0419.[13] In short, Rate Schedule 17 is confiscatory because it seeks explicitly to extract money from Plaintiffs and to subsidize Grant's favored "traditional" customers.

This cross-subsidy is clearly discriminatory because it is explicitly intended to impose an economic burden on Plaintiffs in order to favor Grant's "traditional" customers. It is hard to imagine a more obvious example of rate discrimination. Further, the premium violates PUD's obligation to design its rates to "cover *actual costs* to be incurred by the PUD" in providing service, *Wash. Manufactured Hous. Ass'n*, 124 Wn. 2d at 386, and to "establish its rates at the lowest possible point." *Carstens*, 8 Wn. 2d at 151. The 32% premium has nothing to do with the Grant PUD's actual cost to serve Plaintiffs, so the rates charged Plaintiffs are therefore in excess of the "lowest possible point," making them "excessive and disproportionate to the services rendered." *Lincoln*, 45 Wn. App. at 12.

The District Court rejected this argument on grounds that are, frankly, incoherent. It incorrectly concluded that the 32% premium is intended to pay for

[13] Grant defends this cross-subsidy as "established practice," ER0419, but a practice is not non-discriminatory or non-arbitrary just because it is "established."

transmission upgrades needed in 2021, projected wear on the distribution system, and the risks of losing cryptocurrency load. ER0021-0023. Those are the purposes of *other* elements of Rate Schedule 17, not the 32% premium. ER0307-0311. Hence, even if those elements were not problematic, they would not justify the confiscatory 32% premium.

Further, the 32% cross-subsidy is contrary to Grant's own rate schedules. The 32% premium is currently applied to large industrial customers taking service under Rate Schedule 15 – those with an electrical capacity of 15 MW or more. ER0229-0231. But all Plaintiffs are currently served under Rate Schedule 7, and therefore have between 200 to 5,000 kW of billing demand (0.2 to 5 MW). No Plaintiff comes close to the 15 MW threshold for Rate Schedule 15. In fact, Grant adopted the premium "based upon" Staff's "perception of the type of customer and what our customers and governance would want in terms of discounts and premiums," ER0233-0234, which is a polite way of saying political considerations, not on cost of service analysis or any other evidence that would justify the 32% premium as a legitimate element of Grant's cost to serve Plaintiffs. The premium is also contrary to Resolution No. 8768, which recognizes this level of cross-subsidy is unsupportable for the industrial customers who currently pay it and requires the premium to be reduced to no more than 20% by 2023. ER0200. The District Court's conclusion that Plaintiffs are not likely to succeed in demonstrating that

this element of Rate Schedule 17 is discriminatory must be reversed because it is based on conclusions that have no support in the record.

2. The District Court Erred In Concluding That Grant PUD Properly Ignored Resolution No. 8768, Which Established Multiple Ratepayer Protections Violated by Rate Schedule 17.

A fundamental requirement of both federal and Washington law is that agencies must follow their own policies or, if they deviate from those policies, provide a rational explanation for the deviation. *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016) ("An '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious'" and "unlawful." (citations omitted)); *J.L. Storedahl & Sons, Inc. v. Clark Cty.*, 143 Wn. App. 920, 932 (Wash. Ct. App. 2008). Here, in adopting Rate Schedule 17, Grant PUD deviated in several ways from this established ratepayer protection policy:

- Resolution No. 8768 provides that "[i]n a year that no general retail rate increase is put into effect, no increase will be applied to any rate schedule." ER0199. Rate Schedule 17 violates this directive because Grant PUD imposed no "general retail rate increase" in 2019, yet imposed a double-digit rate increase on cryptocurrency customers through Rate Schedule 17 on April 1, 2019;

- To avoid "rate shock," Resolution No. 8768 requires that rate increases shall be implemented "in small, predictable increases," ER0199, which Grant interprets to require rate increases generally to be limited to 2% per year. ER0224. Rate Schedule 17 blows through these limits by imposing triple-digit rate increases, including the double-digit rate increase imposed on April 1, 2019;

- Resolution No. 8768 guarantees that "*all* customers' first 7,300,000 monthly kwh consumption" (equivalent to 10 MW of demand) will be treated as "preferential access to the low cost embedded power supply resources in place as of the year 2013," ER0199, but Rate Schedule 17 is explicitly intended to deny cryptocurrency businesses "access to low cost power benefits from the Priest Rapids Project," ER0109, even though no Plaintiff has placed demand on Grant PUD even close to the 10 MW threshold.

Although Grant Staff recognized that Resolution No. 8768 would need to be modified to allow adoption of Rate Schedule 17, ER0202, Grant PUD neither modified Resolution No. 8768 nor explained its departure from Resolution No. 8768. Its actions are therefore arbitrary and capricious.

While recognizing that, under Washington law, a municipality such as Grant PUD acts arbitrarily and capriciously where it does not "follow its own procedures," ER0024 (*citing Storedahl*), the District Court nonetheless excused Grant's failure in this regard on two legally indefensible grounds. First, the Court found that *Storedahl* is distinguishable because that case turned on the application of the county code, as opposed to a Resolution that is "subject to change at any time by a vote of the Commissioners." ER0024-0025. This is nonsense. The county commissioners sued in *Storedahl* had the power to change the county code, but they neither changed the code nor followed the procedures they had previously established, making their decision arbitrary and capricious. 143 Wn. App. at 920,

932-33.[14] Likewise, in this case, the Grant Commission, which adopts all official Grant PUD policies through resolutions, was obligated to follow the policies it previously adopted under Resolution No. 8768 or provide an explanation for deviating from them. It did neither.

Second, the District Court concluded that the protections of Resolution No. 8768 do not apply "when a customer is moved from one rate class to another." ER0025. But the evidence the District Court relied on states that "[c]ustomers moving from one rate class to another (e.g., *based on increasing load*) may experience a significantly higher overall rate. This is true for a customer moving from RS 14 – Industrial to RS 15 – Large industrial." ER0426. Plaintiffs have not increased their load, or otherwise done anything to justify moving them from one rate class to another, by, for example, exceeding the 15 MW threshold for service under Rate Schedule 15. Hence, the District Court's conclusion is unsupportable both factually and legally.

[14] Even if Resolution No. 8768 could be considered something less than a full-fledged official policy, Grant PUD was still obligated to explain its deviation from that policy. *See, e.g.*, *Encino Motorcars, LLC*, 136 S.Ct. at 2122, 2126 (agency abused its discretion by failing to explain departure from policy established by "a mere interpretive rule"); *Metlife, Inc. v. Financial Stability Oversight Council*, 177 F. Supp. 3d 219 (D.D.C. 2016) (failure to explain departure from agency guidance document).

Adopting Rate Schedule 17 violated Grant's established consumer protection policy embodied in Resolution No. 8768. Rate Schedule 17 is therefore arbitrary and capricious. The District Court's conclusion that Plaintiffs are not likely to succeed on this claim must be reversed because it relies on both an erroneous legal conclusion and factual inferences that are unsupported by the record.

3. The District Court's Conclusion that Plaintiffs, Who Are Existing Grant PUD Customers, Can Properly Be Assigned Costs Created by Future Cryptocurrency Businesses, Is Legally Incorrect and Factually Unsupported.

Because Plaintiffs became Grant PUD customers when Grant had ample capacity, they are not responsible for the costs supposedly driving Rate Schedule 17. On the contrary, Commissioner Bernd admitted that "[n]one of the [cryptocurrency businesses] who are already here are causing harm to our system," ER0062, and Commissioner Schaapman agreed that "cryptocurrency mining operations that have been operating in the county several years don't present the same risk as the new, incoming cryptos who wouldn't have proven an ability to pay rates longer-term." *Id.*

The Commissioners are undoubtedly correct. At the time Plaintiffs arrived in Grant County, the PUD still had several hundred megawatts of excess generation capacity and ample transmission capacity to serve Plaintiffs' needs, with significant additional capacity for future growth. ER0104-0105. In fact, excess

capacity still exists. *Id.* Rate Schedule 17 is based on the assumption that *future* cryptocurrency miners will increase demand on Grant's system by approximately 200 MW, thereby forcing Grant to accelerate its planned transmission expansions from 2026 to 2021. ER0412 ("Without the 200 MW of load, these mitigations would be unnecessary"). As the District Court concluded, Grant PUD's "calculations all condense into one simple justification: but for the increased interest in cryptocurrency miners in the District, the future upgrades and protection from abandoned facilities would not be necessary." ER0022. But the District Court's conclusion is doubly wrong: it ignored evidence from Grant itself demonstrating that the EI Queue Policy has eliminated the need for future upgrades, and it also wrongly concluded that Plaintiffs can be charged for future upgrades that are caused by *future* cryptocurrency businesses, not Plaintiffs, who are all *current* Grant PUD customers.

Specifically, the District Court ignored uncontested evidence that, as Grant's Staff repeatedly concluded, the EI Queue policy (which Plaintiffs do not seek to enjoin at this time), will cause "years" of delay before any new cryptocurrency business is served by Grant PUD, ER0215, and, in fact, service to new cryptocurrency customers "may never occur" because Grant may never exhaust the queue of "traditional" customers seeking new service. ER0114; *see also* ER0317.

But even if it were true that future growth on Grant's system requires expansion of Grant's transmission system, the District Court ignored evidence that Grant improperly attributed these costs to Plaintiffs. Because Plaintiffs are using existing Grant facilities, and there is no need to expand Grant's transmission facilities to serve Plaintiffs, there is no basis for concluding that Plaintiffs are responsible for "the projected *new* 200 MW of load" which the District Court cited as *the* justification for Rate Schedule 17, ER0021-0023, because those costs are driven by *future* cryptocurrency miners. There is simply no evidence that Plaintiffs, who are *existing* Grant customers, have created the need for any *new* facilities. It was therefore arbitrary for Grant to impose these costs on Plaintiffs, and equally arbitrary for the District Court to conclude that Plaintiffs are unlikely to succeed in demonstrating that this aspect of Rate Schedule 17 is arbitrary and capricious.

The District Court also ignored Grant's new policy that requires new customers to pay upfront for new transmission facilities needed to serve them. ER0448; ER0250 (requiring new customers 500 kW and larger to pay for "any associated transmission for the requested service"). Rate Schedule 17's adders for new facilities are therefore redundant and effectively force Plaintiffs to subsidize facilities for favored customers. ER0328-0329, ER0338-0339.

The District Court's flawed factual conclusions are compounded by egregious legal errors. First, the District Court concluded, based on a single

unexplained reference in an internal Grant PUD document, that rate "grandfathering" is "legally untenable," and that Plaintiffs must therefore be grouped together with future cryptocurrency operations under Rate Schedule 17. ER0023 (*citing* ER0182). This is plain legal error. To start with, Grant PUD itself grandfathers its rates. Indeed, Rate Schedule 7, the schedule under which Plaintiffs are served, includes this grandfather clause: "Service will not be provided under this rate schedule to process heating or boiler service loads greater than 3,000 kW unless such loads were served on this rate schedule prior to January 1, 2001."[15]

Further, grandfathering of rates has long been recognized as necessary to protect settled investment expectations where, as here, a new rate creates a sharp break from past practice and utility customers relied on past practice in making investment decisions. *See, e.g.*, *Public Service Co. of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996) ("The governing principle is that when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospectively-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule'" (citations omitted)). Thus, under federal law, grandfathering of rates has long been recognized as an

[15] *See* Grant PUD Rate Schedule No. 7 (available at: https://www.grantpud.org/templates/galaxy/images/images/Downloads/Rates/LargeGeneralServiceRate7/Sch_7_Apr_1_2018_-_Final.pdf).

appropriate tool in for utility regulators. *See, e.g.*, *Gulf South Pipeline, LP*, 144 FERC ¶ 61,095 at PP 83-85 (2013); *Midwest Ind. System Operator*, 121 FERC ¶ 61,166 at PP 37-44 (2007).

Likewise, grandfathering of rates has long been recognized as valid under Washington law. *See, e.g.*, *PUD No. 2 of Pacific County v. Comcast of Washington IV, Inc.*, 184 Wn. App. 24, 52 (Wash. Ct. App. 2014), *as amended on reconsideration* (Feb. 10, 2015) ("'grandfathering' is permitted under certain, if not all, circumstances"); *Washington Utils. & Trans. Comm'n v. Wash. Natural Gas Co.*, 120 PUR.4th 591, 1991 WL 501697 (1991); *see also U.S. West Communications, Inc. v. Wash. Utils. & Trans. Comm'n*, 134 Wn. 2d 48, 60-63 (Wash. 1997) (upholding prospective-only application of new regulatory accounting rules).

The cases the District Court cites for its claim that grandfathering is not permitted[16] in fact *support* the concept of grandfathering. *Lincoln Shiloh Assoc., Ltd. v. Mukilteo Water Dist.*, 45 Wn. App. 123 (Wash. Ct. App. 1986), considered whether it was permissible to establish a rate classification that would assign new

[16] Both cases interpret statutes governing rates for municipal sewer systems that, unlike RCW 54.24.080, contain no requirement that the rates be non-discriminatory. *See Silver Shores Mobile Home Park, Inc. v. City of Everett*, 87 Wn. 2d 618, 621-23 (Wash. 1976). It is therefore questionable whether the cases have any relevance here at all.

water district customers the costs of new improvements necessary to serve them. Based on "a scientific statistical analysis of the projected cost of new improvements required" that demonstrated that the new customers would benefit from the new improvements, the court approved separate classes for new customers and existing customers. *Id.* at 129-30; *see also Hillis Homes, Inc. v. PUD No. 1 of Snohomish Cnty.*, 105 Wn. 2d 288, 300-01 (Wash. 1986) (the challenged connection charges "pay for only those improvements . . . necessitated by the new customers" and "benefit them alone"); *Silver Shores*, 87 Wn. 2d at 623 (concluding that rate classification for undeveloped area justified by higher costs of construction and lower population densities in that area); *CPS Energy v. PUC of Texas*, 537 S.W.3d 157, 196-97 (Tex. App. 2017).

But there is no evidence, let alone a "scientific statistical analysis," showing that Plaintiffs, who are *current* PUD customers, would receive *any* benefit from the construction of new transmission facilities needed to serve *future* customers. It was therefore arbitrary and capricious to place Plaintiffs into the same class as future cryptocurrency customers and force them to pay costs attributable solely to those future customers. *See, e.g.*, *El Paso Elec. Co. v. FERC*, 832 F.3d 495, 504-09 (5th Cir. 2016) (rejecting FERC order on transmission rates where rates failed to follow cost causation principles); *Illinois Commerce Comm'n v. FERC*, 721 F.3d 764, 770 (7th Cir. 2013) (Posner, J.) (rates for transmission must be "at least roughly

proportionate to the anticipated benefits" to the customer using the transmission facilities); *Pacific Gas & Electric Co. v. FERC*, 373 F.3d 1315, 1320–21 (D.C. Cir. 2004).

4. The District Court's Conclusion That It Is Permissible For Grant PUD to Classify Plaintiffs As "Evolving Industry" While Ignoring Other Grant Customers That Meet the Criteria for "Evolving Industry" Is Arbitrary and Capricious.

As Grant PUD concedes, Grant's large data center customers are indistinguishable from Plaintiffs in terms of the costs Grant incurs to serve them, ER0299, yet Rate Schedule 17 singles out cryptocurrency businesses. Similarly, Grant fails to classify its many customers who share Plaintiffs' risk characteristics as "evolving," ER0304, even though Grant Staff recognized that many of its large customers qualify as evolving under the standards set forth in Rate Schedule 17. ER0049; ER0127; ER0171; ER0173-0177, ER0179-0181; ER0185-0186 (noting that financing rating agencies are focused on risks from Grant's individual customers with more than 20 MW of load – REC Silicon, Microsoft, SGL Carbon Fiber, etc.); ER0189. Hence, Grant fails to treat similarly-situated customers in the same way on two different scores. *See Mass. Mun. Wholesale Elec. Co. v. City of Springfield*, 726 N.E.2d 973, 977 (Mass. App. Ct. 2000) (rate discrimination is impermissible for "consumers who receive the same service under similar conditions"); *Kliks v. Dalles City*, 335 P.2d 366, 375-78 (Or. 1959) (municipal

utility violates anti-discrimination policy by establishing rate classification based on end use rather than cost of service).

In fact, although Grant Staff recognizes that the criteria for classifying an industry as "Evolving" under Rate Schedule 17 "are applicable to many if not all of our large customers to some degree," ER0127, it has, throughout the period relevant to this case, specifically targeted cryptocurrency and ignored other industries exhibiting the same characteristics. *See supra* pp. 14 to 16. The resulting discrimination is most obvious with respect to the polysilicon industry.

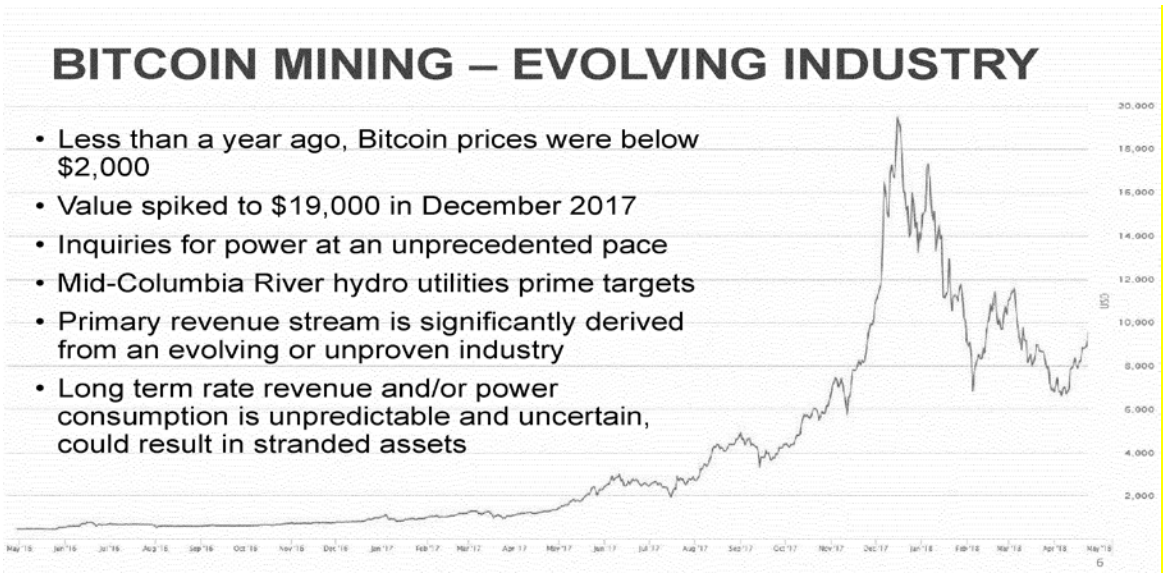
In fact, Grant Staff cited its polysilicon customer, REC Silicon – which was specifically identified as a serious credit risk to Grant because of a precipitous decline in prices for its product, ER0175, and which faces an "existential threat" from the current trade war with China[17] – as an example of the risks Rate Schedule 17 is intended to address. ER0189. Indeed, REC Silicon, whose capacity was originally 134 MW, now indicates it will shut down its operations in Grant County permanently unless it regains access to the Chinese market within the next few

[17] E. Merchant, *REC Silicon's Washington Plant Isn't Closing – Yet*, Greentech Media, (Sept. 26, 2018) (www.greentechmedia.com/articles/read/rec-silicon-washington-plant-isnt-closing-yet#gs.AFUVd9TR).

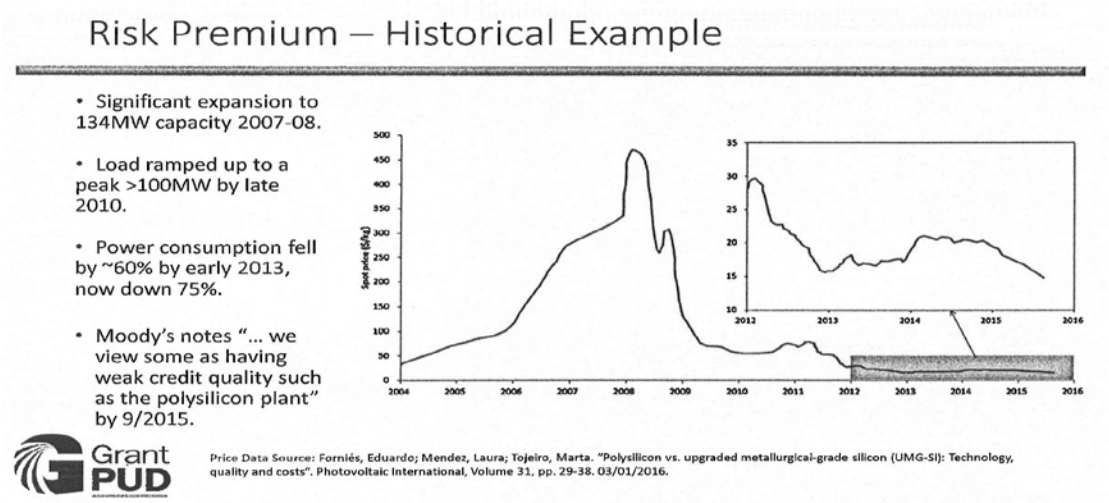
weeks.[18] Yet Grant has never considered including REC Silicon – or any of these other industries – in the "Evolving Industries" class.

The District Court approved of Grant PUD's discrimination, finding that "combining traits from several different industries together" is insufficient to demonstrate discrimination. ER0018. This is simply incorrect. The polysilicon industry is *one* industry, and it meets every "Evolving Industry" criteria. It far surpasses the "concentration risk" criteria because REC Silicon's capacity on Grant PUD is 134 MW, far above the 30.5 MW necessary to pass that threshold. It faces "regulatory risk" because the federal tariff policy has isolated it from its major market in China, rendering it potentially "inviable in the foreseeable future" – as soon as June of this year. It faces "business risk" because its markets are rapidly "evolving," creating a significant reduction in the value of its "primary output," as demonstrated by this chart from a Grant PUD presentation:

[18] "REC Silicon to Shut Down in May," Spokane Spokesman-Review, April 12, 2019 (available at http://www.spokesman.com/stories/2019/apr/12/rec-silicon-to-shut-down-production-in-may-long-te/).



The volatility of polysilicon prices is, if anything, worse than the volatility in cryptocurrency prices:



And, as the District Court conceded, *see* ER0029, Plaintiffs have invested tens of millions of dollars in buildings and equipment that are *not* mobile, *see* ER0327-0328; ER0382-0383; ER0386-0387; ER0389-0391; ER0393-0395; ER0398-0402, which means the only other justification offered by Grant for treating Plaintiffs differently from other similarly-situated customers also fails.

In short, the polysilicon industry (which is but one example) meets every criteria to be classified as an "Evolving Industry." Grant PUD discriminated against Plaintiffs by classifying them as "Evolving Industry" subject to 300-400% rate increases while exempting every other industry that meets the "Evolving Industry" criteria. The District Court's reasoning for concluding that this form of discrimination is acceptable is flatly incorrect. And the District Court's conclusion that cryptocurrency creates "unique" risks because of its price volatility and supposed mobility, ER0016-0018, is unsupported by the record.

5. The District Court's Conclusion That Grant PUD is Exempt From the Anti-Discrimination Requirements of Section 20 of the Federal Power Act Is Clear Legal Error.

Because Grant PUD holds a federal hydropower license for the Priest Rapids Project and the power produced by Priest Rapids is sold in interstate commerce, Grant PUD is subject to Section 20 of the Federal Power Act ("FPA").[19] Section 20 requires that "the rates charged and the service rendered" by Grant "shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable, discriminatory and unjust rates or services are prohibited and declared to be

[19] Section 20 of the FPA applies to any FERC licensee if any "power or any part thereof" produced by the licensed project enters "into interstate or foreign commerce." 16 U.S.C. § 813. Grant PUD holds license No. 2114 for the Priest Rapids Project and sells power from the Project into several states. *See Kootenai Elec. Coop., Inc. v. FERC*, 192 F.3d 144 (D.C. Cir. 1999). Grant is therefore bound by Section 20's strict non-discrimination requirement.

unlawful." 16 U.S.C. § 813. For the reasons described above, Rate Schedule 17 therefore violates federal law as well as Washington law.

The District Court improperly concludes that Grant PUD is wholly exempt from Section 20. ER0026. This conclusion cannot be squared with the plain language of the statute, which does not provide for any exemption from Section 20's prohibition on discriminatory rates. Further, the District Court's conclusion, which effectively eliminates judicial review in nearly every circumstance, must be rejected because it will create a "regulatory gap" that is contrary to Congress's intent in enacting Section 20. *See Yakama Nation v. Grant County PUD*, 103 FERC ¶ 61,073 at P 34 (2003).

The District Court's conclusion is also contrary to the judicial review provision of Section 20, which accords the Plaintiffs the "same rights of hearing … and review" as are provided for under subtitle IV of Title 49 (the Interstate Commerce Act "ICA"), [20] that is, the right to agency action in federal district courts. *See* 49 U.S.C. § 11704; *ICC v. Atl. Coast Line R.R. Co.*, 383 U.S. 576 (1966). And, because Section 20 creates a federal right to be protected against non-

[20] Section 20 provides: "The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in subtitle IV of title 49, and the parties subject to such regulation *shall have the same rights of* hearing, defense, and *review* as said companies in such cases."

discrimination, 28 U.S.C. § 1331 "independently grant[s]" the federal courts jurisdiction over the claim. *Verizon Md., Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 641-43 (2002). The District Court's holding renders these provisions a nullity.

The District Court's conclusion rests on a mistaken reading of Section 20's clause providing for direct enforcement by FERC where "any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such state." 16 U.S.C. § 813. Because Washington has established elected commissions to regulate PUD rates, FERC lacks authority to regulate Grant's rates under Section 20. *Yakama Nation v. PUD No. 2 of Grant Cnty.*, 103 FERC ¶ 61,073 at P 11 & n. 13 (2003). But, if Grant fails to abide by Section 20, as it has done here, the statute gives Plaintiffs the right to enforce their Section 20 rights against Grant PUD in federal court.

The District Court's conclusion rests entirely on a statement in a FERC order that not only is *dictum* but that FERC explicitly disavowed on rehearing of the same order. ER0026 (*citing The Yakama Nation v. Grant County PUD*, 101 FERC ¶ 61,793 at 61,796 (2002)). The cited passage is *dictum* because, in litigating *Yakama Nation*, Grant PUD asserted only that FERC does not have jurisdiction under Section 20, not that it is wholly exempt from Section 20. ER0270-0276. Any suggestion that FERC intended to exempt Grant PUD entirely from Section 20 is disproved in its order on rehearing of the same order relied upon

by the District Court, which cites the very language relied upon by the District Court, and states that FERC only "determined that, because Grant County is a municipality which has been expressly granted self-regulatory authority by the State of Washington, the Commission has no rate jurisdiction over the county under FPA Sections 19 and 20." 103 FERC ¶ 61,073 at P 11 & n. 13 (2003).

The District Court's conclusion that Grant PUD is exempt from FPA Section 20 is therefore clear legal error.

B. The District Court's Conclusion that Grant PUD Could Classify Plaintiffs as "Evolving Industry" Subject to Rate Schedule 17 With No Notice and No Opportunity to Present Evidence Is Based On Multiple Legal Errors and Unsupportable Factual Conclusions.

In adopting Rate Schedule 17, Grant's Commission created a new legal test, requiring Grant Staff to demonstrate that any industry classified as "Evolving Industry" meets Rate Schedule 17's "concentration threshold" – requiring that the industry's cumulative load exceed 5% of Grant PUD's load – and that the industry present either "Regulatory Risk" – defined as the "[r]isk of detrimental changes to regulation with the potential to render the industry inviable within a foreseeable time horizon" – or "Business Risk – defined as the "[p]otential for cessation or significant reduction of service due to a concentration of business risk, in an evolving or unproven industry, in the value of the customer's primary output." ER0124-0125.

Even before the Commission officially adopted Rate Schedule 17, Grant Staff had summarily determined to classify cryptocurrency as an "Evolving Industry." There was no hearing, so Plaintiffs had no notice, no opportunity to be heard, no opportunity to present contrary evidence, and no avenue to appeal to Grant's Commission, which must approve any rate under RCW 54.24.080 ("the Commission" of each PUD "shall be required to establish" all rates and charges for service). "Government may not deprive a person" of a property interest "without providing notice and an opportunity to respond, or, in other words, the opportunity to present reasons not to proceed with the deprivation and have them considered." *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (internal quotation marks omitted); *Southwick, Inc. v. Wash. State*, 200 Wn. App. 890, 897 (Wash. Ct. App. 2017); *see also Matter of Troupe*, 4 Wn. App. 2d 715, 730-31 (Wash. Ct. App. 2018) ("fundamental part" of due process is being heard "in a meaningful manner").

The depth of the due process violation is underscored by the fact that, if Grant Staff had actually considered the evidence, Plaintiffs could not have been classified as "Evolving Industry." *See Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (due process requires procedures that minimize "risk of error"). There is good evidence already in Grant's hands that cryptocurrency does not, and will never, exceed the 5% "concentration risk" threshold

required under Rate Schedule 17. ER0317-0318. In fact, Grant itself projects its 2018 cryptocurrency load will be 20.05 average MW ("aMW"), a number that has fallen further, ER0204-0205, well below the 5% (30.5 aMW) "concentration risk" threshold.[21] Further, because cryptocurrency has been placed at the end of the EI Queue, it will be "years" before any new cryptocurrency business is served by Grant, ER0215, and it "may never occur." ER0114; *see also* ER0317.

There is also good evidence in Grant's possession demonstrating that cryptocurrency is not threatened with inviability and that regulators around the world are moving to adapt existing regulatory structures to accommodate cryptocurrency, not to eliminate it. *E.g.*, ER0221 (concluding that cryptocurrencies are "unlikely to disappear completely"). This evidence demonstrates that cryptocurrency does not meet either the "regulatory risk" or "business risk" tests of Rate Schedule 17. But Grant Staff never considered any of this evidence, and instead marched to the predetermined

[21] In 2018, Grant's average load was 603 average aMW. ER0209. Hence, the 5% threshold is 30.5 aMW. Grant's actual cryptocurrency load is now even lower than the predicted 20.05 aMW because one cryptocurrency firm, with a capacity of 2 MW, left Grant County after Rate Schedule 17 was enacted, ER0211-0212, and a second is bankrupt. *See* Roberts, *supra* note 5; ER0318. Further, Telco 214, formerly a plaintiff in this action, has shut down its 6.25 MW cryptocurrency operation in Grant County.

conclusion that cryptocurrency businesses must be subject to Rate Schedule 17.

Concluding that Grant PUD could, without offending due process, raise its rates in any amount without notice and without providing the customers subject to the rate increase an opportunity to be heard, the District Court found that Plaintiffs are not likely to succeed on their due process claims. ER0027-0032. The District Court's conclusions are based on a series of indefensible legal errors. The District Court also conflates Plaintiffs' argument – that they were denied any opportunity to demonstrate that they do not meet the criteria set forth in Rate Schedule 17 for being classified as "Evolving Industry" – with an argument they did not make, that Grant PUD violated due process by adopting Rate Schedule 17.

The District Court's errors are most obvious in its conclusion that Grant Commission's adoption of Rate Schedule 17 was a legislative act. ER0031-0032.[22] But this contradicts the District Court's own assumption that

[22] Further, even if Grant's actions were purely legislative, heightened due process protection would be required because "[w]hen one person, or relatively few people, are exceptionally affected by a decision on individual grounds, then such persons may be entitled to basic due process rights, including individual notice," especially if those persons are "specifically targeted" by the legislative act. *Holbrook, Inc. v. Clark Cnty.*, 112 Wn. App. 354, 365-66 (Wash. Ct. App. 2002); *see also Harris v. Cnty. of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990); *Pac. Nw. Venison Producers v. Smitch*, 1992 WL 613294, at *5 (W.D. Wash. Sept. 2, 1992).

Grant's classification of "cryptocurrency mining . . . as an evolving industry was adjudicatory." ER0028. In fact, Grant Staff's determination whether Plaintiffs can properly be classified as "evolving industry" under the terms of Rate Schedule 17 is a classic example of a quasi-judicial administrative process – Grant Staff is called upon to determine whether a specific group of ratepayers falls within a class with specific parameters defined by the Commission in the legislative process. *See Duffy v. Riveland*, 98 F.3d 447, 458 (9th Cir. 1996) (citing *Yaw v. Walla Walla Sch. Dist.*, 106 Wn. 2d 408, 414 (Wash. 1986)). Plaintiffs were therefore entitled to basic due process protections required for quasi-judicial proceedings, including rights of notice, to present contrary evidence, and to appeal. *See, e.g.*, *Morgan v. U.S.*, 304 U.S. 1, 18-19 (1938); *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 105-06 (1963). But Plaintiffs were accorded none of these rights. Instead, even before Rate Schedule 17 was adopted, they were classified as "Evolving Industry" with no notice, no hearing, and no opportunity to present contrary evidence, and with no findings ever made that they met the "Evolving Industry" criteria. Grant therefore violated Plaintiffs' due process rights.

The District Court's conclusion that Plaintiffs have no property rights at stake that are protected by due process is equally in error. Despite clear evidence that the 32% "premium" Plaintiffs must pay is a confiscatory

transfer of wealth from Plaintiffs to Grant PUD's favored "traditional" customers, the District Court "decline[d] to analyze" whether Rate Schedule 17 is confiscatory, asserting that neither Washington nor Federal law protects Plaintiffs against confiscatory rates. ER0030.

This is contrary to federal precedent dating back to at least 1896. *See Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896) (U.S. Constitution protects against confiscatory rates that are "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law"); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307–08 (1989) (discussing history of cases providing constitutional protection against confiscatory rates); *Mich. Bell Telephone Co. v. Engler*, 257 F.3d 587, 593 (6th Cir. 2001) (due process requires a mechanism to challenge confiscatory rates); *Guarantee Nat'l Ins. Co. v. Gates*, 916 F.2d 508, 514-15 (9th Cir. 1990).

It is also contrary to Washington law. *E.g., U.S. West Communications*, 134 Wn. 2d at 69-70; *People's Organization for Washington Energy Resources v. Washington Utils. & Trans. Comm'n*, 104 Wn. 2d 798, 812 (Wash. 1985) (the "power to regulate is not a power to destroy ..."); *accord Mississippi Power Co. v. Miss. Pub. Serv. Comm'n*, 168

So. 3d 905, 913-16 (Miss. 2015) (due process is violated where "ratepayers' property (money) is being confiscated through government decree, by a rate increase" approved by state utility regulators). The District Court's conclusion that Grant PUD may, without offending due process, increase its rates so much that Plaintiffs' investments in Grant County are destroyed, ER0029-0030, is therefore also incorrect.

The District Court's error is compounded by its reliance on the strawman claim that Plaintiffs are claiming a property interest in a "particular utility rate." ER0029-0030. Plaintiffs' property interests are not in a "particular rate," but in non-arbitrary rates, a right that Washington courts have long recognized. *Earle M. Jorgenson Co. v. City of Seattle*, 99 Wn. 2d 861, 868 (Wash. 1983) (customers of publicly-owned electric utilities have a "due process right … in nonarbitrary rates"); *Washington State Att'y Gen'ls Office v. Wash. Utils. & Trans. Comm'n*, 128 Wn. App. 818, 832 (Wash. Ct. App. 2005) (same for investor-owned utilities). This right arises from the statutory guarantee that PUD rates must be "fair and," except for rates for low-income residential customers, "nondiscriminatory." RCW 54.24.080. Further, Washington's Open Public Meetings Act establishes specific procedural requirements for public bodies, such as Grant's Commission, which is prohibited from adopting resolutions or other official acts except by

public vote at public meetings which have been properly noticed, RCW 42.30.060, in which all members of the public may attend, RCW 42.30.030, and in which all votes are recorded in publicly-available minutes. RCW 42.30.035.

These are analogous to the state law requirements the Supreme Court found to create a property right to utility service that cannot be denied without adequate notice and a right to hearing. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11 (1978). That is, because these Washington statutes create "a 'significant substantive restriction' on . . . decision making," *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994) (citations omitted), Plaintiffs enjoy a right to fair and non-discriminatory rates that rises to the level of a property right. *See also Mississippi Power*, 168 So. 2d at 913-15 ("While this Court understands that the ratepayers have no property interest in a *certain rate*, the ratepayers may not be 'subject to proceedings in which he or she may be deprived of a protected property interest'" and have a "right to know when and how much its rates will be increased at all stages of a proceeding").

The District Court's conclusion that Plaintiffs are unlikely to succeed on their due process claims must be reversed because it rests on multiple legal errors.

C. Plaintiffs Face an Immediate Threat of Harm.

The denial of Plaintiffs' rights to due process "unquestionably constitutes irreparable injury," and "it follows inexorably" from the demonstrated violation of Plaintiffs' constitutional rights that Plaintiffs "have also carried their burden as to irreparable harm." *Hernandez*, 872 F.3d at 994-95 (citations omitted). In addition, the rate increases imposed on Plaintiffs, which Grant itself describes as "exponential," ER0059, and "huge," ER0062, and which will result in rate increases on the order of 300-400% on their most important input, threaten Plaintiffs with bankruptcy. ER0362-0363; ER0371-0372; ER0377, ER0379-0380; ER0383-0384; ER0406-0407. As the District Court recognizes, "[a] legitimate threat that a company might become bankrupt or be driven out of business . . . does show irreparable harm," ER0037, because if the business is lost, "a favorable final judgment might well be useless." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *see also Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985).

Plaintiffs provided unequivocal evidence that the 300-400% rate increases contemplated in Rate Schedule 17 will destroy their businesses (and their substantial investments) in Grant County, and may result in their bankruptcy. ER0362-0363; ER0371-0372; ER0377, ER0379-0380; ER0383-0384; ER0406-0407. The District Court therefore erred in concluding that the economic harm

suffered by Plaintiffs was a "mere possibility." *See Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011) (Plaintiff's declaration that she was likely to fail the bar without accommodations for vision impairment was sufficient to demonstrate irreparable harm). The District Court also asserts that because Rate Schedule 17 will be phased in with three incremental steps, Plaintiffs will not "immediately" feel the effects of the rate increases. ER0037-0038. But the Plaintiff declarations the Court cites support exactly the opposite conclusion. ER0362-0363; ER0371-0372; ER0377, ER0379-0380; ER0383-0384; ER0406-0407.

The due process violation suffered by Plaintiffs demonstrates they will suffer irreparable injury. The immediate economic harm they will suffer independently demonstrates irreparable injury.

D. The Equities Favor the Plaintiffs.

The District Court concludes that the equities weigh in Plaintiffs' favor. ER0038. This is doubtlessly correct. In balancing the equities, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 866 (9th Cir. 2017). The extreme rate increases required by Rate Schedule 17 threaten immediate financial devastation for

Plaintiffs and the failure to accord any process to Plaintiffs constitutes an ongoing violation of their constitutional rights.

On the other hand, two Commissioners conceded that Plaintiffs, all existing cryptocurrency businesses, are not imposing burdens on Grant. Further, the supposed 1,500-MW "rush" of cryptocurrency businesses to Grant County has now dissipated and, in any event, because of the EI Queue policy (which Plaintiffs do not seek to enjoin at this juncture), it will be years, if ever, before any new cryptocurrency business can take service from Grant PUD.

Further, many alternatives to Rate Schedule 17 are available for Grant to mitigate the risks supposedly justifying Rate Schedule 17. For example, Plaintiffs have the ability to shut down during peak demand periods, and Grant can therefore enter into "demand management" contracts with Plaintiffs or others to reduce loads during peak periods, which would eliminate the need for new transmission facilities purportedly driving Rate Schedule 17. Grant failed to consider these, or any other "non-wires" alternatives, to transmission construction. ER0299, ER0318-0319.

Likewise, although the substantial deposits already paid by Plaintiffs protect Grant PUD from the default risks driving Rate Schedule 17, Grant considered neither whether those deposits adequately protect Grant nor any other risk

management arrangements as an alternative to Rate Schedule 17's massive rate increases. *See* ER0319.

Hence, Grant will not be harmed if Rate Schedule 17 is enjoined. On the contrary, Rate Schedule 17 would force Plaintiffs to terminate their businesses in Grant County, eliminating annual revenues to Grant of approximately $1.55 million, and forcing other Grant ratepayers to bear the burden of this lost revenue.

E. Granting Plaintiffs' Request Will Further the Public Interest.

As the District Court correctly recognized, ER0039, "public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Hernandez*, 872 F.3d at 996 (citation omitted). The District Court wrongly absolved Grant PUD of constitutional violations demonstrated by Plaintiffs and therefore erred in its public interest determination.

Further, as demonstrated above, an injunction will prevent Grant PUD's ratepayers from having to bear the burden of lost revenues that would occur if Rate Schedule 17 forces Plaintiffs to shutter their businesses in Grant County, and will keep in place rates that have allowed Grant to maintain sound financial health for many years. *See* ER0077-0079. And "having government officials act in accordance with law . . . invokes a public interest of the highest order," *B.E. v. Teeter*, 2016 WL 3033500, at *6 (W.D. Wash. May 27, 2016) (internal quotation

marks omitted). An injunction is in the public interest here because it will stop Grant's violations of both Washington and Federal law.

The District Court concludes that Grant PUD is acting in the public interest by "protecting the public's need for long-term power" while addressing "immediate needs and concerns" generated by "cryptocurrency's interest in Grant County." ER0039. To support this claim, the District Court cites a series of communications from Grant PUD customers expressing various concerns about serving cryptocurrency customers. ER0082-0100. But this evidence supports the inference that by enacting Rate Schedule 17, Grant PUD catered to the parochial concerns of its customers, not to the general public interest. *See, e.g.*, ER0083 ("many rate payer [*sic*] dislike giving away our energy for cash flow to large out of county users"); ER0085-0086 (claiming that cryptocurrency businesses are "parasites" engaged in "theft" and the PUD should "make them go away"); ER0089 ("Our precious energy resources should only be used to improve the quality of life of our residents and county"); ER0095 (Port of Moses Lake urging Grant PUD to impose punitive rate increases on cryptocurrency miners in order to favor "traditional industries"). It certainly provides no support for the proposition that Rate Schedule 17 is necessary to secure long-term power supplies for the County, especially in light of the unrebutted evidence that the EI Queue policy will

delay new cryptocurrency businesses for years, and perhaps forever, and that no new power supply is needed to serve Plaintiffs.

CONCLUSION

In rejecting the Plaintiffs' request for a preliminary injunction, the District Court committed multiple legal errors and based its decision on factual findings that lack support in the record. This Court should therefore reverse the District Court's decision and impose a preliminary injunction preventing Grant PUD from implementing Rate Schedule 17 for the duration of this litigation.

Respectfully submitted this 3rd day of May, 2019.

CAIRNCROSS & HEMPELMANN, P.S.

s/ *Eric L. Christensen*
Eric L. Christensen, WSBA #27934
Attorneys for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Plaintiffs are not aware of any related cases.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, I hereby certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 11,867 words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in 14-point, Times New Roman font using Microsoft Word.

CAIRNCROSS & HEMPELMANN, P.S.

s/ *Eric L. Christensen*
Eric L. Christensen, WSBA #27934
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: May 3, 2019

CAIRNCROSS & HEMPELMANN, P.S.

s/ *Eric L. Christensen*
Eric L. Christensen, WSBA #27934
Attorneys for Plaintiffs-Appellant

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BLOCKTREE PROPERTIES, LLC, a Washington limited liability company, CORSAIR INVESTMENTS WA, LLC, a Washington limited liability company, CYTLINE, LLC, a Delaware limited liability company, 509 MINE, LLC, a Washington limited liability company, MIM INVESTORS, LLC, a Washington limited liability company, MINERS UNITED, LLC, a Washington limited liability company, MARK VARGAS, an individual, and, WEHASH TECHNOLOGY, LLP, a Washington limited liability company,

Plaintiffs-Appellants,

v.

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON, a Washington municipal corporation, TERRY BREWER, individually and in his official capacity, BOB BERND, individually and in his official capacity, DALE WALKER, individually and in his official capacity, TOM FLINT, individually and in his official capacity, LARRY SCHAAPMAN, individually and in his official capacity, and DOES 1-10, managers and employees of Grant

NO. 19-35277

D.C. NO. 2:18-CV-00390 RMP

U.S. District Court for Eastern Washington, Spokane

DECLARATION OF MARK VARGAS

PUD, individually and in their official capacities,

Defendants-Appellees.

I, Mark Vargas, declare that I am over the age of eighteen, am competent to testify to the matters below, and make this declaration based upon personal knowledge.

1. I am one of the Plaintiffs in this lawsuit and an individual citizen of the State of California who operates facilities in Grant County, Washington, in my own name. I am a principal of Mission Valley Mining, LLC, a California Limited Liability Company which operates similar facilities in California and Tennessee.

2. I operate two cryptomining facilities in Moses Lake, Washington that, until April 1, 2019, were both served under Grant County PUD's Rate Schedule 7, for large general service.

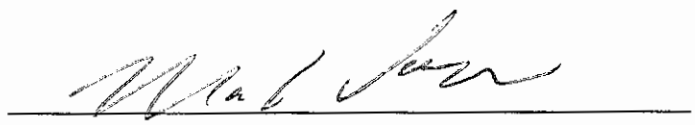
3. Until April 2019, one of my Moses Lake facilities had an average demand of just under 200 kW. Accordingly, under Grant County PUD's new Rate Schedule 17, that Moses Lake facility would be served under Rate Schedule 17A, which is for "Evolving Industry" customers with less than 200 kW in monthly demand.

4. If that Moses Lake facility were to continue to be served under Rate Schedule 17A at the same level of demand as indicated in its March 2019 Grant County PUD utility bill, the facility's April 2019 facility bill would have increased by approximately 95% over the previous month's bill, nearly doubling from $3,554 to $6,932.

5. In order to mitigate some of this projected rate increase, I have allocated additional machinery to this Moses Lake facility to bring its demand for April 2019 onward over 200 kW, so that it will be served under Grant County PUD's Rate Schedule 17B, which is for "Evolving Industry" customers with over 200 kW in demand. As a result, I anticipate that this Moses Lake facility will be served under Grant County PUD's Rate Schedule 17B, which I anticipate will cause a slightly less drastic immediate rate increase of 36%, from $3,554 to $4,831.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 1st day of May, 2019.



Mark Vargas

No. 19-35277

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BLOCKTREE PROPERTIES, LLC, a Washington limited liability company, et al.

Plaintiffs-Appellants,

v.

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON, a Washington municipal corporation, et al.

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Washington, Spokane, No. 2:18-cv-00390-RMP

ADDENDUM TO APPELLANTS' BRIEF

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STATUTORY PROVISIONS

16 U.S.C. § 813. Power entering into interstate commerce; regulation of rates, charges, etc.

When said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in subtitle IV of Title 49 and the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 807 of this title for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this chapter.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

49 U.S.C. § 11704. Rights and remedies of persons injured by rail carriers

(a) A person injured because a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part does not obey an order of the Board, except an order for the payment of money, may bring a civil action in a United States District Court to enforce that order under this subsection.

(b) A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part. A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable to a person for amounts charged that exceed the applicable rate for the transportation.

(c)(1) A person may file a complaint with the Board under section 11701(b) of this title or bring a civil action under subsection (b) of this section to enforce liability against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(2) When the Board makes an award under subsection (b) of this section, the Board shall order the rail carrier to pay the amount awarded by a specific date. The Board may order a rail carrier providing transportation subject to the jurisdiction of the Board under this part to pay damages only when the proceeding is on complaint. The person for whose benefit an order of the Board requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the rail carrier does not pay the amount awarded by the date payment was ordered to be made.

(d)(1) When a person begins a civil action under subsection (b) of this section to enforce an order of the Board requiring the payment of damages by a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the text of the order of the Board must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The findings and order of the Board are competent evidence of the facts stated in

them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district—

(A) in which the plaintiff resides;
(B) in which the principal operating office of the rail carrier is located; or
(C) through which the railroad line of that carrier runs.

In a civil action under this paragraph, the plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff.

(2) All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the rail carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of any of those plaintiffs against the defendant found to be liable to that plaintiff.

(3) The district court shall award a reasonable attorney's fee as a part of the damages for which a rail carrier is found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.

RCW 42.30.030. Meetings declared open and public

All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.

RCW 42.30.035. Minutes

The minutes of all regular and special meetings except executive sessions of such boards, commissions, agencies or authorities shall be promptly recorded and such records shall be open to public inspection.

RCW 42.30.060. Ordinances, rules, resolutions, regulations, etc., adopted at public meetings--Notice--Secret voting prohibited

(1) No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void.

(2) No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void, and shall be considered an "action" under this chapter.

RCW 54.24.080. Rates and charges--Waiver of connection charges for low-income persons

(1) The commission of each district which shall have revenue obligations outstanding shall have the power and shall be required to establish, maintain, and collect rates or charges for electric energy and water and other services, facilities, and commodities sold, furnished, or supplied by the district. The rates and charges shall be fair and, except as authorized by RCW 74.38.070 and by subsections (2) and (3) of this section, nondiscriminatory, and shall be adequate to provide revenues sufficient for the payment of the principal of and interest on such revenue obligations for which the payment has not otherwise been provided and all payments which the district is obligated to set aside in any special fund or funds created for such purpose, and for the proper operation and maintenance of the public utility and all necessary repairs, replacements, and renewals thereof.

(2) The commission of a district may waive connection charges for properties purchased by low-income persons from organizations exempt from tax under section 501(c)(3) of the federal internal revenue code as amended prior to the July 23, 1995. Waivers of connection charges for the same class of electric or gas utility service must be uniformly applied to all qualified property. Nothing in this subsection (2) authorizes the impairment of a contract.

(3) In establishing rates or charges for water service, commissioners may in their discretion consider the achievement of water conservation goals and the discouragement of wasteful water use practices.

RCW 74.38.070. Reduced utility rates for low-income senior citizens and other low-income citizens

Notwithstanding any other provision of law, any county, city, town, public utility district or other municipal corporation, or quasi municipal corporation providing utility services may provide such services at reduced rates for low-income senior citizens or other low-income citizens: PROVIDED, That, for the purposes of this section, “low-income senior citizen” or “other low-income citizen” shall be defined by appropriate ordinance or resolution adopted by the governing body of the county, city, town, public utility district or other municipal corporation, or quasi municipal corporation providing the utility services. Any reduction in rates granted in whatever manner to low-income senior citizens or other low-income citizens in one part of a service area shall be uniformly extended to low-income senior citizens or other low-income citizens in all other parts of the service area.